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THE SALE OF MUNITIONS OF WAR BY NEUTRALS TO BELLIGERENTS

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With respect to the rights of our citizens as neutrals to sell munitions of war to any belligerent power, it is submitted:

1. That these rights are in no way denied by the rules of international law.

2. That these rights are not forbidden by any municipal statute or ordinance except as to vessels of war and, in certain limited cases, as to our neighboring American republics, when the latter are involved in civil strife.

3. That such rights have been constantly exercised in this country since the beginning of its history and in like manner have been habitually exercised by the manufacturers of the most enlightened commercial nations of the world, not only in remote times, but during all recent wars.

4. That such rights were fully recognized and reserved by the conventions of the Second Hague Conference in 1907.

5. That the maintenance of such rights is wise and necessary as their abolishment would force upon all nations a policy of the highest military and naval preparedness, which policy is one of vast economic loss and deeply hostile, instead of favorable, to peace.

6. That the fact that certain belligerents are prevented by the forces of the other from taking advantage of our markets does not make sales to those who have such access a breach of neutrality.

7. That the powers which most severely attack this right have greatly profited by habitually exercising it in all recent wars and, under parallel circumstances, where the market was accessible to but one of the belligerents, have continued these sales to the other.

As to the three first propositions that the right is denied by neither international nor municipal law and has been constantly exercised, one cannot do better than to quote a communication by Thomas Jefferson, Washington's secretary of state, and often deemed

the founder of one of our great political parties, to the British minister, May 15, 1793. Mr. Jefferson says:

Our citizens have been always free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal disarrangement in their occupations. It is satisfied with the external penalty pronounced in the president's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of any of the belligerents' powers on their way to the port of their enemies.¹

Alexander Hamilton is clear in his declaration to the same effect in his Treasury Circular of August 4, 1793, which declares:

The purchasing within, and exporting from the United States, by way of merchandise, articles commonly called contraband, being generally war-like instruments, and military stores, is free to all the parties at war, and is not to be interfered with.²

In 1796 Mr. Adet, minister of France, complained of the export of contraband of war, namely horses, to the enemies of France but Mr. Pickering, secretary of state, maintained such practice, subject to the right of seizure in transit. He collects judicial decisions, both state and federal to support his views.

When in 1862 our neighboring republic of Mexico complained of the export of military supplies from the United States to that country, on French account, Mr. Lincoln's secretary of state, William H. Seward, replied:

If Mexico shall prescribe to us what merchandise we shall not sell to French subjects, because it may be employed in military operations against Mexico, France must equally be allowed to dictate to us what merchandise we shall allow to be shipped to Mexico, because it might be belligerently used against France. Every other nation which is at war would have a similar right, and every other commercial nation would be bound to respect it as much as the United States. Commerce, in that case, instead of being free and independent, *would exist only at the caprice of war.*³

¹ Mr. Jefferson, secretary of state, to British minister, May 15, 1793. *5 M. S.; Dom. Let. 105; 1 American State Papers 69, 147; 3 Jefferson's Works*, Pp. 558, 560. quoted, *7 Moore's Digest*, p. 955.

² *American State Papers, Foreign Reports*, p. 140; quoted, *Moore's Digest*, p. 955.

³ Mr. Seward, secretary of state, to Mr. Romero, Mexican Minister, December 15, 1862. *M. S. Notes to Mexico VII*, 215-7; *Moore's Digest*, p. 958.

The above extract has especial force when we recall the strong opposition of this government and of Mr. Seward to the French occupation of Mexico, yet the principle was announced though contrary to national sympathy and personal feeling.

Mr. John Bassett Moore collates, in his invaluable digest, eighteen pages of extracts from the utterances of our presidents, secretaries of state and other high officials, to like effect, including in addition to those named, Presidents Pierce and Grant; secretaries of state Henry Clay, Marcy, Fish, Evarts, Bayard, Frelinghuysen Blaine, Foster, Olney and John Hay; attorneys general Speed and Harmon; also a clear and strong opinion by Mr. Elihu Root, when United States district attorney for New York.⁴

Turning from the utterances of our executive officers to the courts, we find the latter hold consistently that a contract for the export of contraband by neutral citizens to a belligerent is neither unlawful nor immoral; that it is merely subject to frustration by the other belligerents by seizure on the high seas or in belligerent territory; that courts of justice, therefore, though refusing to aid all illegal or immoral contracts, or those against public policy, yet fully recognize, enforce and give damages for breach of such contracts as above, recognizing them as innocent and the rights founded thereon as meritorious.⁵

In that case Lord Chancellor Westbury quoted the opinion of our own Supreme Court per Story J. (perhaps our greatest judicial scholar in international law) in the *Santissima Trinidad* (7 Wheaton, p. 240) that "there is nothing in our laws or in the law of nations that forbids our citizens from sending . . . munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

In 1905 the English courts held like doctrine as to the shipment of contraband during the Russo-Japanese war.⁶

In 1901 the United States Circuit Court for the Eastern Dis-

⁴ See 7 *Moore's Digest*, pp. 955-973.

⁵ See *Ex Parte Chavasse* In Re Grazebrook 34 L. J. N. S. Bankruptcy 17 (*Scott's Cases on International Law*, p. 779).

⁶ See *Law Guarantee and Trust Soc. vs. Russian Banks* K. B. Div. H., Ct. Law Times, Vol. XVIII, p. 503. See also: 2 *Oppenheim International Law*, p. 431; *Taylor International Law*, p. 741,

tract of Louisiana was applied to by three persons, owners of property in the South African republic, to restrain the export of horses and mules from the United States by Great Britain for use in the Boer war, but such relief was denied, and the traffic in contraband was held by the court to be lawful and the rule not changed by the treaty relating to the Alabama Claims.⁷

The Hague Conference of 1907 adopted the following convention as to neutral duties in war on land and also as to maritime war:

A neutral power is not bound to prevent the export or transit on behalf of one or the other of the belligerents of arms, munitions of war, or, generally, of anything which can be of use to an army or fleet.⁸

The note in Hershey's *Essentials of International Public Law*, page 459, to the above shows that official protests by belligerent governments against this right are heard in nearly every war. That the view represented by these protests is championed by a small band of publicists, notably Hautefeuille, Phillimore and Kleem, Professor Hershey, who, by the way, holds a doctorate from Heidelberg University, adds very justly, "It is without sanction, either in theory or practice."

One of the expert delegates of the United States at The Hague told this writer within the week that he remarked at The Hague that apparently the main object of the Conference was to prevent any interference with the export of arms by the Krupps at Essen.

These Hague Conventions were generally ratified—Austria-Hungary and Germany both ratifying them on November 27, 1909. I do not refer to these conventions as establishing any new rule but as stating clearly and agreeing explicitly to the existing rule.

Turning from the legality to the policy of the rule in question, it is submitted:

That a system under which a peaceful commercial state may not, when attacked, use her cash and her credit in the international markets to equip herself for defense is intolerable and in every way pernicious.

The war-like and aggressive nation chooses the moment of attack and is naturally fully equipped. If the nation assailed

⁷ See Pearson *vs.* Parson, 108 Fed. R. 461. The number of judicial citations might be much increased if it were necessary.

⁸ See Hershey's *Essentials of International Law*, pp. 459 and 467.

cannot replenish her supplies from outside she must always maintain them at the top notch of efficiency or she exposes herself to ruin.

If a nation, the moment she becomes, willingly or unwillingly, a belligerent, is helpless to augment her defensive equipment from outside, if she cannot, as this writer, if he may be allowed to quote himself, said recently in the *Outlook*, import "a pound of powder, a gallon of petrol, an ounce of copper, a gun, a sabre, a harness or a horse," then a wasteful system is forced on all nations under which they must always, without intermission or relaxation maintain their defenses and warlike supplies on a war footing of the highest efficiency and amplitude.

One of the ripest scholars in international law was the late Professor Westlake, one of the founders and presidents of the Institute of International Law. Moreover, his was one of the clearest, strongest and fairest minds addressed to international questions. In 1870, when a former Count Von Bernstorff, then German ambassador at London, protested against the export of military supplies from England to France during the Franco-German war, Professor Westlake discussing the effect of forbidding such export wrote:

One disadvantage of no ordinary magnitude I can plainly see. The manifest tendency of all rules, which interfere with a belligerent's power to recruit his resources in the markets of the world, is to give the victory in war to the belligerent who is best prepared at the outset; therefore, to make it necessary for states to be in a constant condition of preparedness for war; therefore to make war more probable.

In other words, as Professor Westlake has pointed out, it would tend strongly to force all nations to the extreme of militarism, a policy economically impoverishing and also most perilous to peace. The policy of open neutral markets for war supplies enables peaceful wealth to be transmuted and defense to be rapidly provided. Neutral markets would not be denied the aggressor by the restriction since he, knowing his plans, could largely provide for them before belligerency. As this writer lately observed:

Wars now are sudden as conflagrations in their origin and the advantages of preparation and initiative are immense. Why make them vastly greater? Why tempt to secret preparation and sudden aggression by greatly reducing the re-

* Collated papers, *Westlake on Public International Law*, p. 391.

sources and avails of the defending power? *Why aid the wolf and hamstring the lamb?* Why by a change of law and policy aid and encourage the predatory policy and debilitate defense? Such change must stimulate war and discourage peace.

It is therefore opposed to the general interest of mankind and the present rule is wiser and more pacific tending to maintain the safety and stability of the nations whose main employments are in the peaceful arts.

To bring the matter to a more recent date, a letter from the present secretary of state, Mr. Bryan, to Senator Stone, chairman of the senate committee on foreign relations, published on January 25, 1915, and understood to have been drafted by Mr. Robert Lansing,¹⁰ is in accord with the above. Mr. Bryan says:

There is no power in the executive to prevent the sale of ammunition to the belligerents. The duty of a neutral to restrict trade in munitions of war has never been imposed by international law or by municipal statute. It has never been the policy of this government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighboring American republics, and then only when civil strife prevailed. Even to this extent the belligerents in the present conflict, when they were neutrals, have never, so far as the records disclose, limited the sale of munitions of war.

His Excellency, the German ambassador to the United States, communicated to this government, and on April 12, 1915, gave to the press a statement criticising the conduct of this government in permitting the export of munitions of war to belligerents as "in contradiction with the real spirit of neutrality." His Excellency further urged an embargo against the shipment of war munitions to the allies or the use of this trade to force the allies to permit the export of food from the United States to Germany.¹¹ In the communication, this passage is found:

In reality the American industry is supplying only German's enemies, a fact which is in no way modified by the purely theoretical willingness to furnish Germany as well, if it were possible.

In reply an able note was sent to His Excellency signed by the secretary of state, Mr. Bryan, but said to have been penned by President Wilson. This impliedly treats the rights of neutrals to

¹⁰ See *New York Herald*, January 25, 1915.

¹¹ See *New York Herald*, April 15, 1915.

export munitions of war to belligerents as settled and assured and declares our government holds:

That any change in its own laws of neutrality during the progress of a war which would affect unequally the relations of the United States with the nations at war, would be an unjustifiable departure from the principles of strict neutrality by which it has sought to direct its action, and I respectfully submit that none of the circumstances urged in your Excellency's memorandum alters the principle involved.

It is constantly strongly urged that since the allies command the seas, and the Germans cannot get access to our markets, while the allies can, that real neutrality requires us to refuse such supplies to the allies. It is submitted that nothing could be more impossible or confusing than to shift the rule of neutral obligations with the varying events and successes of war. The risks of capture may thus shift, but not the obligation of the neutral.

As Professor Westlake says:¹²

The standard set up is equality of treatment in the sense of permitting or furnishing to both belligerents the same things which are permitted or furnished to either, without regard to the fact that the passage of troops through neutral territory, coaling of fleet in neutral waters, or any other thing, may mean victory or *salvation* to the one, while the other *may be unable to avail himself of the licence or may find it of no value*.

German citizens have habitually sold vast quantities of military supplies to belligerents. Essen is perhaps the very center of military supplies and has exported on an enormous scale to belligerents in all modern wars, making, it is understood, vast profits from this traffic in the late Balkan wars. It will be interesting to know what has been Germany's practice when one of the belligerents had access to her markets and the other had not. Has the rule been observed, which she now presses upon us? Has she recognized this situation as compelling her to deny to the power having access, the right to buy, on the ground that *real neutrality so required?*

The war between the South African republic and Great Britain began in October, 1899, and was closed by the Treaty of Pretoria at the end of May, 1902. During the earlier portion of the war, supplies were received by the Boers through Lorenzo Marques, a neighboring Portugese port with some freedom, but in August, 1900,

¹² *International Law*, p. 172.

all the customs officials at Lorenzo Marques were dismissed and their places filled by military officers and a force of 1,200 men was sent out from Lisbon. The frontier was guarded and the trade stopped.¹³

The strictness of the Portugese authorities increased with the decline of the fortunes of the Boers.

England had seized and searched a number of neutral steamers—including three German steamers—and positively claimed the right to seize contraband bound to the Boers though through a neutral port. She relied for this largely on the precedents of our Civil War, and it would appear that the access of the Boer force to German markets was substantially destroyed. The question occurred to the writer, would it be found that during the later years there were imported from Germany into England large quantities of arms and military supplies notwithstanding this situation? He therefore took the liberty to apply to the British Embassy at Washington which very obligingly cabled to London for information. April 27, a letter from the Embassy advised that "when the Boers were shut off from supplies by sea, Great Britain got from Germany 108 Fifteen-pounder quick-firing guns and 500 rounds per gun. They were purchased from Ehrhardt by private negotiation." It is respectfully submitted that this is sufficient to support the practice of our government. But this writer had made other investigations which showed vastly larger military supplies passing from Germany to Great Britain at this time. This appears from the statistics as to the foreign trade of the United Kingdom compiled at the custom house, and presented to both Houses of Parliament by command of His Majesty and printed for His Majesty's stationary office. These published records long anterior to the present unhappy controversy preserved in the Library of the Department of Commerce of the United States show that there were imported from Germany into Great Britain.

In 1899. Swords, cutlasses, matchets and bayonets, cwts. 782.

1900. Swords, cutlasses, matchets and bayonets, cwts. 1,664.

1901. Swords, cutlasses, and arms of other sorts not Firearms, cwts. 12,560.

1902. Swords, cutlasses, and arms of other sorts not Firearms, cwts. 50,734.

Many more than from any other source.

Rifles, carbines, fowling pieces, muskets, pistols or guns of any sort.

¹³ See Campbell's *Neutral Rights in Anglo-Boer War*, p. 60.

1899. Value £655; in 1900, £428.

In 1901. Metal cartridge cases, other than small arms ammunition (more than six times as many as from any other source), 1,378,600.

1901. Cordite and other smokeless propellants, 231 cwts.

1901. Gunpowder, 318 cwts. 1902. 253 cwts.

Dynamite and other high explosives.

1901. 11,029 cwts. 1902. 14,771 cwts. and in latter year these explosives were worth £84,894.

Rockets and other combustibles for warlike purposes. Explosives and ammunition unenumerated.

1901. Of the Value of £29,546. 1902. Of £26,171.

Small Arm Ammunition

1901. Numbers 3,350,040. 1902. Numbers 4,732,500.

Fuses, Tubes and Primers

1901. Numbers 898,007. 1902. Numbers 2,033,116.

The consumption of ammunition in the present war is on so vast a scale that the above figures may seem trivial but we must remember that Mr. Lloyd George has recently said that in a single battle in the present war more ammunition was consumed than during the entire Boer war.

It is submitted that the above trade figures between Germany and Great Britain embalm a principle and afford a German precedent in entire accord with the law and practice announced by our own government. They are the more convincing because Germany's sympathy was strongly with the South African republic and strongly against England.

It is submitted that the practice of the government of the United States in declining to forbid the sale and export by its citizens of munitions of war to either belligerent at the present time is not in conflict with international or municipal law. It is in accord with a wise and salutary international policy. It is in entire harmony with the express declaration of the last Hague Conference and with the long continued practice of this country, and of those countries which have questioned the practice.